

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7508

Petition of Georgia Mountain Community Wind, LLC,)
for a certificate of public good, pursuant to 30 V.S.A.)
Section 248, authorizing the construction and operation)
of a 5-wind turbine electric generation facility, with)
associated electric and interconnection facilities, on)
Georgia Mountain in the Towns of Milton and Georgia,)
Vermont, to be known as the "Georgia Mountain)
Community Wind Project")

Order entered: 3/3/2011

ORDER RE: MOTION TO EXCLUDE PREFILED TESTIMONY AND EXHIBITS

On January 13, 2011, Jane and Heidi FitzGerald and Scott McLane submitted prefiled testimony and several exhibits in this Docket regarding the issue of the appropriate distance that the proposed wind turbines should be set back from adjoining property. On February 10, 2011, Georgia Mountain Community Wind, LLC ("GMCW") filed a motion to exclude certain portions of the prefiled testimony submitted by the FitzGeralds and Mr. McLane.

In this Order, the Public Service Board ("Board") grants in part and denies in part GMCW's motion to exclude testimony and exhibits.

Motion of GMCW

GMCW contends that certain testimony and exhibits submitted by the FitzGeralds and Mr. McLane:

is objectionable and should be excluded on at least four grounds: (1) it is not based upon the personal knowledge of the witnesses as required by V.R.E. [Vermont Rules of Evidence] 602; (2) it constitutes inadmissible hearsay evidence under V.R.E. 802; (3) it constitutes inadmissible opinion testimony by lay persons based upon inadmissible hearsay evidence, contrary to V.R.E. 701-703; and (4) it is inadmissible under V.R.E. 403 because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the Board.

GMCW contends that the FitzGeralds and Mr. McLane are not expert witnesses, and therefore their testimony must be limited to the personal knowledge of the witnesses and may not rely upon hearsay.

In particular, GMCW objects to the testimony of the FitzGeralds and Mr. McLane that cites to wind turbine setbacks that have been imposed in other jurisdictions.

Responses to the Motion

On February 22, 2011, the FitzGeralds filed a response to GMCW's motion. The FitzGeralds assert:

it is important for the Board to be presented with examples of guidelines and regulations in other jurisdictions where the issue of a reasonable setback has already been determined. The Petitioner has failed to provide the Board and parties with any examples of setback guidelines in other jurisdictions. . . . Petitioner can address its concerns regarding certain exhibits through cross-examination.

On February 22, 2011, Mr. McLane filed a letter opposing GMCW's motion. Mr. McLane contends that the exhibits accompanying his testimony are admissible through judicial notice, and alternatively through the Vermont Rules of Civil Procedure 44.1 and V.R.E. 803(8). In addition, Mr. McLane maintains that his prefiled testimony, which summarizes the content of the exhibits, is admissible pursuant to V.R.E. 1006.

Reply to the Responses

On March 2, 2011, GMCW filed a reply to Mr. McLane's response. GMCW argues that: (1) Mr. McLane's testimony is not based on his personal knowledge; (2) the ordinances cannot be judicially noticed; (3) the ordinances are not business records; (4) Mr. McLane's testimony summarizing the ordinances is not admissible if the ordinances are not admissible; and (5) Mr. McLane's testimony is not relevant.¹

1. GMCW's motion did not include an objection based on relevance. Because relevance was not raised in the Motion, today's Order ruling on the Motion does not consider GMCW's relevance argument.

Discussion

In ruling on an objection to testimony, the Board does not decide whether particular testimony is compelling. Instead, the Board decides the more narrow question of whether that testimony should be allowed into the evidentiary record pursuant to the rules of evidence and the discretion accorded the Board in 3 V.S.A. § 810(1).

In contrast to a superior court, the Board's review of a project under 30 V.S.A. § 248 is as an expert body that is engaged in a "legislative, policy-making process."² In administrative proceedings such as these, the Board is the trier of fact and there is no jury to protect from unreliable evidence.

The testimony and exhibits submitted by the FitzGeralds and Mr. McLane are focused on the imposition of setback requirements for wind turbines in other jurisdictions. Our June 11, 2010, Order approving the project stated that "our approval of this Project is conditioned on our determination of a reasonable setback requirement in further proceedings to be held in this docket"³ In our discussion of whether to impose setbacks in this case, we specifically stated that "other state and local public agencies have addressed potential public health and safety impacts of wind turbines by establishing setbacks based on the size of the turbine, including the blades."⁴ Clearly the decisions that other jurisdictions have made regarding setbacks for wind turbines may help inform our decision in this case. The question is whether the testimony and exhibits at issue are admissible under the Vermont Rules of Evidence and Vermont Administrative Procedures Act.

GMCW objects to testimony submitted by the FitzGeralds that cites to and summarizes Mr. McLane's testimony regarding setback requirements in other jurisdictions. The FitzGeralds state that "the duplication of the same information and ordinances in their testimony would not be helpful or efficient to the process. Therefore, the FitzGeralds in their prefiled testimony referred to the testimony of Scott McLane." Regardless of whether the reference to Mr.

2. *In re Amended Petition of UPC Vermont Wind*, 2009 Vt. 19, ¶ 2 (citing *In re Vt. Elec. Power Co.*, 2006 Vt. 69, ¶ 6).

3. Docket 7508, Order of 6/11/10 at 34.

4. Docket 7508, Order of 6/11/10 at 33 (citations omitted).

McLane's testimony is hearsay, it is duplicative and, because Mr. McLane has submitted the testimony and will appear for cross-examination, the FitzGeralds' testimony does not assist the Board in assessing Mr. McLane's testimony. Accordingly, we exclude page 3, lines 3-7 of the FitzGeralds' testimony.

In addition, GMCW objects to exhibit J. FitzGerald Supp. JF-1, which consists of a newspaper article that discusses setbacks for wind turbines in New York, as well as the FitzGeralds' testimony summarizing the newspaper article. The FitzGeralds state that "[a] newspaper article is one example of how a reasonable person obtains information in order to form an opinion on a subject" and should therefore be admitted as "it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." The FitzGeralds further note that they provided GMCW with copies of the municipal ordinances referenced in the newspaper article.

Although a municipal ordinance on setback requirements would be something that would be commonly relied upon by a reasonably prudent person in the conduct of their affairs, the same cannot be said for a newspaper article reporting on a municipal ordinance. Furthermore, a newspaper article does not fall within any of the exceptions to the hearsay rule. It is difficult to determine whether there are inaccuracies in a newspaper article, whereas a government-issued document such as a municipal ordinance can be readily verified. Because the FitzGeralds acknowledge that they are lay witnesses, rather than expert witnesses, they cannot rely on hearsay evidence in their testimony. Accordingly, page 3, lines 14-18 of the FitzGeralds' supplemental testimony, as well as exhibit J. FitzGerald Supp. JF-1, are excluded.

GMCW objects to exhibit J. FitzGerald Supp. JF-2, which consists of a handout prepared by General Electric concerning siting wind turbines, as well as the prefiled testimony by the FitzGeralds that references that exhibit. GMCW not only objects on the basis that the presentation is hearsay evidence, but also contends that the presentation is misleading, and attaches a report from General Electric that GMCW contends provides more accurate information regarding setback distances from property lines. The FitzGeralds assert that the testimony and exhibits are not misleading and confusing because the plain language of the

exhibit appears to be inconsistent with the General Electric report provided by GMCW with its objection to the exhibit.

The report is hearsay evidence, and accordingly, we exclude exhibit J. FitzGerald Supp. JF-2 and page 3, lines 14-18 of the FitzGerald's prefiled testimony. However, we note that the FitzGeralds may seek to use the General Electric documents to cross-examine GMCW's witnesses during the technical hearings.

GMCW contends that the majority of Mr. McLane's testimony, page 3, line 1 to the end of the testimony, as well as all of the exhibits submitted by Mr. McLane (exhibits SM-1 through SM-115) should be excluded as hearsay because Mr. McLane is not an expert witness. GMCW further contends that the testimony and exhibits should be excluded as confusing and prejudicial. In response, Mr. McLane maintains that the exhibits consist of (1) relevant excerpts of other state statutes; (2) county and municipal ordinances; (3) model ordinances published by governmental agencies; and (4) regulations and adjudicative decisions issued by state administrative agencies. In addition, exhibit SM-1 consists of a summary of the setback requirements contained in the remaining exhibits. Further Mr. McLane asserts that, even if the exhibits are hearsay, he should be considered an expert witness and allowed to rely on the information contained in the exhibits in submitting testimony.

A witness can be qualified as an expert through research and study. Mr. McLane has clearly conducted significant research on setback requirements in other jurisdictions,⁵ an issue that was specifically raised by the Board. No other witness has demonstrated this level of knowledge on the issue,⁶ and accordingly, we conclude that Mr. McLane's research has qualified him as an expert on the issue of setback requirements in other jurisdictions, and his prefiled testimony would be allowed even if we were to exclude exhibits SM-1 through SM-115.

With respect to the question of the exhibits included with Mr. McLane's testimony, with the exception of exhibit SM-1, the exhibits consist of municipal and county ordinances, decisions

5. Without judging the merits of a decision on appropriate setback distances, we appreciate Mr. McLane's research on an issue specifically identified by the Board.

6. We note that GMCW's expert witness on siting wind turbines stated, in response to a question on setback standards, "I'm not aware of really any standards in other states regarding property lines per se." Tr. 2/10/10 at 241 (Zimmerman).

by administrative bodies, portions of relevant statutes, and model ordinances published by governmental agencies. The Board specifically cited to setback requirements in other jurisdictions in determining that additional information was required for us to establish appropriate setback distances for this project.⁷ Accordingly, the exhibits filed by Mr. McLane provide the type of information that is helpful in making a determination on this issue. The narrow question is how this information can be used during these proceedings. The Board, in other dockets, has admitted decisions of administrative bodies and documents composed by governmental agencies; however, this information is not admitted for the truth of the matter asserted in such documents. For example, the Board could recognize that a particular agency decided to impose setbacks for wind turbines based upon an analysis of the distance from which ice could be thrown from a turbine. However, if the agency decision found that ice could be thrown 1,000 feet, we would not include that distance as a finding of fact in our order, because the witness that was relied upon to produce that finding is not available in this proceeding, and the parties, and the Board, cannot cross-examine that witness to determine the underlying assumptions and methodology of the calculation that produced that number. For these reasons, we will allow the admission of exhibits SM-2 through SM-115 for the limited purpose of showing the setback recommendations and determinations of other governmental entities; they are not admitted for the truth of any underlying facts set forth in the exhibits.⁸ With respect to exhibit SM-1, the exhibit is a summary of setback requirements established in other jurisdictions. It is not unusual for an expert witness, such as Mr. McLane, to provide summaries of relevant information in the form of an exhibit, and, accordingly, we will not exclude exhibit SM-1.

We are particularly troubled that GMCW has argued that information on wind turbine setbacks contained in ordinances and siting decisions from other jurisdictions is potentially misleading and confusing for an expert tribunal responsible for siting wind turbines. If GMCW believes that the setback requirements established by other jurisdictions are not appropriate in

7. Docket 7508, Order of 6/11/10 at footnote 36.

8. This ruling is consistent with our established practice of the parties and the Board itself relying on regulatory and other legal authority from other jurisdictions. Such authority need not be included in the evidentiary record, and instead may be directly cited in legal briefs and Board discussions. Furthermore, the Board is not taking judicial notice of the exhibits; instead the Board is admitting these documents for the limited purpose described above.

this case, it may present that case during these proceedings. However, it is difficult to conceive of why GMCW would attempt to exclude the type of information that we specifically cited to in our decision to establish setback requirements.

So ORDERED.

Dated at Montpelier, Vermont, this 3rd day of March, 2011.

<u>s/ James Volz</u>)	
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<u>s David C. Coen</u>)	
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PUBLIC SERVICE
BOARD
OF VERMONT

OFFICE OF THE CLERK

FILED: March 3, 2011

ATTEST: s/ Judith C. Whitney
Deputy Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)